United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Docket No. 75-1014

To be argued by:
James E. Cullum

IN THE

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHN J. LYNCH,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of New York

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BRIEF FOR APPELLEE

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STATEMENT OF THE CASE

Nature of Case and Course of Proceedings

The Appellant, John J. Lynch, was charged in a three count Indictment with violations of the federal Bank Robbery Statute, Title 18, United States Code, Section 2113(a) (Count I); 2113(b) (Count II); and 2113(d) (Count III). Lynch made suppression motions which were denied after a hearing and he was found guilty by a jury on Counts I and II. A mistrial was declared on Count III as the jury was unable to reach a verdict. Lynch was subsequently sentenced to concurrent terms of seven years imprisonment on each of the two counts on which he was found guilty. It is from the judgment of conviction on these two counts that he now appeals. The issues raised on appeal are those dealing with the suppression motions.

Statement of Facts

The Community State Bank, Schenectady, New York, was robbed on June 7, 1974, by a lone, white male. The sum of $2,750.00 was taken, including $1,000.00 in bills of ten and twenty dollar denominations whose serial number had been recorded: (Bait Money).

At approximately 10:30 P.M. on the night of July 6, 1974, at the Price Chopper Market, an all-night market between Schenectady and Albany, New York, a store employee found a shaving kit in a shopping cart which contained a box of .22 caliber bullets, a pair of sun glasses and $1,212.00 in currency. Sometime before midnight the defendant appeared at the store to claim the shaving kit. Present at the time were Quintos, the store night manager, and Murray, a security investigator for the store. After Lynch reluctantly identified himself, Murray directed the store manager to contact the police and to count the money in front of Lynch. (T.M. 53).*

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* "T.M." refers to pages of the minutes of the suppression hearing and trial which are consecutively numbered.

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BRIEF FOR APPELLEE

ISSUES PRESENTED

1. Was the weapon seized from the Appellant's vehicle pursuant to a valid consent search and related finding of probable cause that said weapon was an instrumentality of a crime?

2. Was the arrest of the Appellant for a violation of the New York State Penal Law Section 265.05 valid since it was based on the probable cause?

3. Was the seizure of the money a valid taking of evidence relating to the state violation of illegally possessing a weapon?

4. Was the money validly taken into custody by the police in the course of their normal police duties irrespective of the gun violation?

When officers Roland and Leonard of the Town of Colonie Police Department arrived, the money was lying out on a counter near a cash register in the front of the market. (T.M. 10, 12, 47, 48, 54, 68). Lynch, the two store employees and the two officers were around the money. Lynch was once again reluctant to show identification when asked by Sgt. Roland to do so. (T.M. 10, 12, 64). Testimony by the two officers and Murray confirms that Officer Leonard picked up the money from the counter, placed it in the shaving kit and carried it outside. (T.M. 14, 32, 45, 46, 47, 48, 68, 69, 131 and 483). On the basis of this testimony, and contrary to the testimony of Lynch and Quintos that it was Lynch who picked up the money, (T.M. 54, 162), Judge Foley found that "the police had possession and custody of the money by taking it from the store counter." He found that Officer Leonard first took the money and other articles from the store counter and carried them outside. (Judge Foley's Memorandum-Decision and Order, Appendix to Appellant's Brief, p. A-10).

The two officers then accompanied Lynch out of the store. The testimony then shows that Officer Leonard obtained Lynch's permission to turn off Lynch's car as it was overheating. (T.M. 16, 69). Officer Leonard at that point handed the kit containing the money to Officer Roland. (T.M. 72, 33, 17). Officer Roland and Lynch got in Officer Roland's police car while Officer Leonard went over to Lynch's car to turn it off. (T.M. 16). Officer Roland maintained custody of the kit containing the money until Officer Leonard returned from the defendant's car. (T.M. 17, 18, 73).

While Officer Leonard was turning Lynch's car off he observed a sawed-off rifle stock on the front seat of the vehicle. (T.M. 70). He then noticed a barrel of a rifle sticking out from beneath a sheet on the back seat. (T.M. 71). He removed the sheet and observed a .22 caliber rifle with its stock removed. (T.M. 71). He did not remove these objects from the vehicle at that time. (T.M. 71). Leonard returned to Officer Roland's car where Roland and Lynch were sitting. He told Roland about his observation of the weapon. (T.M. 71, 72, 17). Officer Roland then gave the money back to Officer Leonard (T.M. 18, 38, 73).

Roland then obtained Lynch's permission to search his vehicle (T.M. 18, 39). When the three men arrived at Lynch's car Officer Leonard put the money on the front seat, pushed the front seat forward (it was a two-door vehicle) and removed the rifle. (T.M. 18, 39, 73). Lieutenant Hahn, also of the Colonie Police Department, was then called to the scene by Officer Roland and arrived at the scene shortly thereafter (T.M. 19, 75, 42). During this time the money remained on the front seat of the Lynch vehicle, the weapon remained in the custody of the police and the three men remained outside of the vehicle. (T.M. 42). When Lt. Hahn arrived he was advised of the circumstances concerning the money by the other officers (T.M. 42, 105). The Lieutenant then reached in the Lynch vehicle and took the kit containing the money from the front seat. (T.M. 43, 77, 105). Lt. Hahn was also told about the weapon which was brought to him by one of the officers for examination. (T.M. 107). Thereafter the defendant was placed under arrest for a violation of New York State Penal Law Section 265.05, which prohibits the possession of concealable weapons.[1] He was released on his own recognizance later that night, but the money, weapon, rifle stock and bullets were retained by the police. A subsequent check of the serial numbers of the bills disclosed that 41 of them ($530.) were bait

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[1] NYS Penal Law, Section 265.05 states in pertinent part:

2. Any person who has in his possession any firearm which is loaded with ammunition, or who has in his possession any firearm, and, at the same time, has in his possession any quantity of ammunition which may be used to discharge such firearm is guilty of a class D felony.

3. Any person who has in his possession any firearm. . .is guilty of a class A misdemeanor.

NYS Penal Law, Section 265.00 sets forth the following definitions:

2. "Firearm" means any pistol, revolver, sawed-off shotgun or other firearm of a size which may be concealed upon the person.

11. "Rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder. . . .

money bills from the Community State Bank. Lynch was arrested on July 8, 1974, in connection with the bank robbery charges.

At the suppression hearing Lynch testified that he picked up the money from the store counter and kept it in his possession at all times. (T.M. 162, 184). He also testified that he did not object to Officer Leonard turning off his car (T.M. 188), and that although Leonard searched the interior of the vehicle (T.M. 165, 166), the Officer could have seen the rifle by merely looking in the back seat (T.M. 189). He testified that he was asked by Leonard upon the latter's return from the vehicle if he had anything else in the car. Lynch testified that he then told Leonard about the gun because he thought Leonard had seen the gun by looking in the back seat of the vehicle. (T.M. 189).

Lynch further testified that he consented to the search of the vehicle's trunk after which he got into the car and was ready to depart with the money (T.M. 166, 167). He stated that when Lt. Hahn arrived he got back out of the car and left the money on the front seat (T.M. 167). He testified that he took the gun from the car to show to Lt. Hahn because he didn't think it was illegal. (T.M. 165, 170, 190). Lynch further testified that money was taken from the car by Lt. Hahn after his arrest (T.M. 195).

In his decision regarding the defendant's general suppression motion, Judge Foley recognized the unusual circumstances of the case as well as the inconsistencies and contradictions in the testimony (Appendix to Appellant's Brief, pp. A-8, A-9). The Judge then found:

> 1. From the totality of the circumstances, that all of the personal property was taken by the officers with the voluntary consent of the defendant. (Appendix to Appellant's Brief, p. A-8). An important consideration in this regard was the defendant's testimony that he didn't think there was anything illegal about the gun and that in fact he had shown it to Lt. Hahn. (Appendix to Appellant's Brief, p. A-9).
>
> 2. That Lynch agrred to let one of the officers turn off his motor and that if the consent finding above is in error the plain view doctrine would properly be involved. (Appendix to Appellant's Brief, p. A-9).

3. That the money never came into the possession of the police by any search or seizure of Lynch or his automobile but that the police had actual possession of the money by taking it from the store counter and at least constructive possession of it when it was placed in the defendant's car. (Appendix to Appellant's Brief, p. A-9, A-10).

4. That there was probable cause to arrest the defendant for a violation of the New York Penal Law and therefore the arrest was valid notwithstanding the outcome of the charges. (Appendix to Appellant's Brief, p. A-10).

Judge Foley denied the defendant's general suppression motion and his motion to suppress evidence obtained from a lineup. At trial much of the evidence that had been introduced at the suppression hearing along with several identifications by bank eye-witnesses aided in convicting the defendant.

ARGUMENT

A. The Weapon

POINT I

THE WEAPON WAS SEIZED FROM LYNCH'S VEHICLE PURSUANT TO A VALID CONSENT SEARCH AND RELATED FINDING OF PROBABLE CAUSE THAT SAID WEAPON WAS AN INSTRUMENTALITY OF A CRIME.

When Officer Leonard went over to turn off the overheated motor of Lynch's car he did so with Lynch's consent (T.M. 16, 69). The defendant's own testimony reflected this consent when he stated at the suppression hearing that he did not object to Leonard's action because he "had no reason to object to it." (T.M. 188).

Having entered the vehicle with Lynch's consent, it was permissible for Leonard to observe anything in plain view such as the sawed-off stock of the rifle and the barrel sticking from beneath the sheet. *Harris* v. *United States*, 390 U.S. 236, 88 S.Ct. 992 (1968); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022 (1971); *United States* v. *Barone*, 330 F.2d 543, (2d

Cir., 1964), *cert. denied*, 377 U.S. 1004. Having properly observed the stock and barrel, it was then permissible for him to uncover the weapon since he then had probable cause to believe that an instrumentality of a crime, to wit: a concealable weapon, was present in the car. It is a reasonable deduction that the stock probably came from the same weapon as the barrel and that therefore the barrel portion was likely to be a concealable weapon. If looking under the sheet constituted a search beyond the limits of Lynch's consent to Officer Leonard's entry of the car, and beyond the limits of an inspection of that which was in "plain view", it was still valid since the officer had probable cause and because the mobility of an automobile validates warrantless searches when such probable cause exists. *Carroll* v. *United States*, 267 U.S. 132, 45 S.Ct. 280 (1925); *Chambers* v. *Maroney*, 399 U.S. 42, 90 S.Ct. 1975 (1970).

This case is analogous to the situation in *Kendrick* v. *Nelson*, 448 F.2d 25 (9th Cir. 1971), where an officer having authority to look into a glove compartment observed a cartridge clip therein. It was held that he had probable cause to believe that the occupants might have a dangerous weapon. *Kendrick*, supra at p. 27. Once the officer has validily obtained probable cause, he may then search a vehicle just as though a warrant had been obtained.

> "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." *Chambers* v. *Maroney*, supra, at 90. S.Ct. 1981.

As a result of the foregoing the weapon could have been validly seized by Officer Leonard anytime after making his observations upon his initial entry of the car.

Aside from the foregoing justification for the seizure of the weapon upon the first entry of the car, the validity of the seizure was separately and distinctly legitimatized by the defendant's subsequent consent for the officers to make the second entry of

the car. Having given this second consent the defendant was properly precluded by the District Court from vitiating the validity of the resulting search.

In deciding the voluntariness of Lynch's consent for Officer Leonard to initially enter the vehicle to turn off the car and for the second entry to conduct a complete search, the Court must look at all of the circumstances. Judge Foley acknowledged that consent is determined from the totality of circumstances citing *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041 (1973) and *United States* v. *Demarco*, 488 F.2d 828 (2d Cir. 1973). The circumstances here were: that Lynch was not in custody at the time of either entry of the car by Officer Leonard; that the automobile was in a large, lighted public parking area; that the store employee, Murray, was in the parking lot near the officers and Lynch (T.M. 131); that there was no coercion used by the police; that the incident involved a reasonable investigation by police into the unusual finding of a large amount of money; and that the defendant did not think there was anything illegal about the weapon ultimately seized. Judge Foley properly found, under the circumstances, that the articles from the car were taken with the defendant's voluntary consent. (Appendix to Appellant's Brief, p. A-8, A-9).

Lynch argues that the trial court erred in findings that the seizure resulted from his consent. (Appellant's Brief, p. 9). He points out that while consent to search may have been given it did not encompass the resulting seizure. This viewpoint fails to recognize that the consensual search resulted in a finding of probable cause which justified the seizure.

The appellant also attempts to invalidate the seizure by pointing out that he requested the return of his property and that therefore there was no consent. This analysis must be predicated on the erroneous principle that instrumentalities of a crime properly in police possession must be returned on demand or that consent may be retroactively withdrawn. Both of these premises are without merit.

In analyzing the defendant's consent it is notable, as Judge Foley recognized, that the defendant testified that he himself took the gun from the vehicle and showed it to Lt. Hahn, his admitted motive being that he did not think it was illegal. This subjective state of mind is reflective of the voluntariness of his consent.

Finally with respect to the issue of consent, the trial court made its findings after a careful review of the record, noting the inconsistencies and contradictions in testimony, and by looking at the totality of the circumstances. (Appendix to Appellant's Brief, p. A-8). The evidence presently available to this Court should now be viewed in the light most favorable to the Government. *United States* v. *Miner*, 484 F.2d 1075, 1077 (9th Cir. 1973); *United States* v. *Sherman*, 430 F.2d 1402, 1404 (9th Cir. 1970). Moreover, the reviewing court should not reverse the findings of the District Court as long as there is substantial evidence to support its findings and there is no clear error on the record. *Mullins* v. *United States*, 487 F.2d 581, 589 (8th Cir. 1973); *United States* v. *McNally*, 485 F.2d 398, 406 (8th Cir. 1973). Also, the District Court is responsible for determining the credibility of witnesses and deciding factual issues. *McNally*, supra at 406. In the present case the record affords the necessary substantial evidence upon which the District Court Judge could base his findings. Furthermore, his reference to the acceptability and credibility of the testimony of the police officers (Appendix to Appellant's Brief, p. A-9) fortifies his findings which should not now be overturned.

POINT II

THE ARREST OF THE DEFENDANT FOR A VIOLATION OF NEW YORK PENAL LAW SECTION 265.05 WAS VALID SINCE IT WAS BASED ON PROBABLE CAUSE.

The appellant places great reliance on the argument that the seizure of evidence from him was unreasonable since the arrest for the weapon violation was invalid. He contends that the proper disposition of the state charge, i.e. if the charge should be dismissed on legal grounds stemming from the length of the weapon then the arrest itself is contaminated. This notion is erroneous.

Only probable cause is required to validate the arrest. The ultimate outcome of the statute under which the police were operating in the present case:[2]

> Section 140.05 — A person who has committed or is believed to have committed an offense and who is at liberty within the state may. . .be arrested for such offense although no warrant of arrest therefor has been issued and although no criminal action therefor has yet been commenced in any criminal court.
>
> Section 140.10 —
>
> 1. Subject to the provisions of subdivision two, a police officer may arrest a person for:
>
> (a) any offense when he has reasonable cause to believe that such person has committed such offense in his presence; and
>
> (b) a crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise.

The defendant's arrest was clearly valid. It is not necessary for the defendant to have actually committed a crime. It is only necessary that he was "believed to have committed the offense" and that the arresting officer had probable cause. There is ample proof in the present case for the officers' honest belief that

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[2] NYS Crim. Procedure Law, Sections 140.05 and 140.10.

the weapon was capable of being concealed on a person. This is evidenced by its length having been shortened and its bulkiness having been reduced by the removal of the stock. Thus, if the defendant escapes criminal liability because of a later determination that the overall length of the weapon renders it incapable of being concealed on the person, the legality of the arrest is unaffected as is the incidental search.

This case is analogous to the situations in *United States* v. *Dameron*, 460 F.2d 294 (5th Cir. 1972) and *United States* v. *Kilgen*, 445 F.2d 287 (5th Cir. 1971) where a search was made incidental to an arrest for a violation of an unconstitutionally vague statute. The courts held that the search, which resulted in a finding evidence used in charges unrelated to those for which the arrest was made, remained valid since the police were acting in good faith. In the instant case, such good faith is also present. Certainly, the observations of the officers would lead them to believe that the weapon was concealable. The weapon, contrary to the appellant's intimation, was not measured at the scene and, in fact, was never measured by the arresting officer until the time of the suppression hearing. Because a state court may subsequently decide that as consequence of the weapon's length the charges must fail, the good faith of the officers is not weakened. The arrest is proper and the seized weapon may validly be introduced in the federal prosecution.

The only issue determinative of the validity of the arrest is whether probable cause existed. The Supreme Court stated in *Brinegar* v. *United States*, 338 U.S. 160 at 175, 69 S.Ct. 1302 at 1310:

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.

In the instant case the necessary probable cause was present, as demonstrated by the testimony adduced at the hearing and as found by Judge Foley. (Appendix to Appellant's Brief, p. A-10).

In the Appellant's Brief, various New York lower court cases are cited which, although immaterial to the federal charge, may be distinguished. The case of *People* v. *Roberts*, 73 Misc. 2d 500 is cited wherein a sawed-off shotgun which was 23-1/2 inches in length was not considered a "firearm" within the meaning of the statute. The *Roberts* case is distinguishable from the present case in that in *Roberts* the barrel of the shotgun was sawed off while in the present case it was the stock that was removed. The court in *Roberts* acknowledged this distinction:

> However, a different result might have been reached if the bulky stock were removed beyond the pistol grip portion thereof. *People* v. *Roberts*, supra at 502.

The appellant also refers to *People* v. *Palermo*, 36 A.D. 2d 565 and *People* v. *Raso*, 9 Misc. 2d 739, where, in reference to Section 265.05 or its predecessor, the courts held that possession of rifles was not prohibited by this subdivision.

As set forth in the Government's Statement of the Case, the statutory definition of a "rifle" is set forth in Section 265.00 of the New York State Penal Law:

> "Rifle" means a weapon designed or redesigned, made or remade, and *intended to be fired from the shoulder. . . .*" (Emphasis added)

Clearly, the *Palermo* and *Raso* decisions referring to rifles do not cover the weapon in the present case which was obviously remade so that it would not be fired from the shoulder.

B. The Money

POINT III

THE SEIZURE OF THE MONEY WAS A VALID TAKING OF EVIDENCE RELATING TO THE STATE VIOLATION OF ILLEGALLY POSSESSING A WEAPON.

In order for the money to be validly seized it is only necessary that there existed probable cause to believe that it would aid in convicting the defendant of the state weapon charge. *Warden* v. *Hayden*, 387 U.S. 294, 300 87 S.Ct. 1642, 1650 (1967). The officers in the present case had the necessary probable cause to believe that if the money was ultimately proven to be the defendant's it could be introduced into evidence in the state court in connection with Lynch's motive for possessing the weapon or his intent to possess it.

The appellant cannot claim that taking the money for use as evidence was improper, since the police did not come into possession of it by a search or seizure involving the appellant or his automobile. (See Judge Foley's Memorandum-Decision and Order, Appendix to Appellant's Brief, A-9). The District Court found that the money had been lost and that the police had actual possession and custody of the money by taking it from the store counter. (Appendix to Appellant's Brief, p. A-10). The Court further found that even when the money was placed on the front seat of the Lynch vehicle, the police maintained constructive possession of it. Under these circumstances the Court was correct in concluding that there was no search or seizure involving Lynch or his automobile. By losing the money Lynch lost the necessary possessory interest which is required to allege that his rights had been violated by the seizure. Moreover, any proprietary interest claimed by Lynch was in serious doubt at the time the police took the money. The store, which had custody of the money, called the police to relieve itself of the burden of custody and of determining ownership. In relieving the store of these burdens the officers were acting in a reasonable manner and were participating in a transaction solely between

themselves and the store. Under the circumstances of this case, the appellant's involvement was merely incidental to this transaction in that he claimed a proprietary interest which could not be properly ascertained until after the police took the money. It was Lynch's assertion of ownership which occasioned the calling of the police and their taking custody of the money. It is not logical that he should now be permitted to use such claim of ownership to attack this taking. The appellant, therefore, lacks standing to contest the validity of the seizure.

The money, having been properly taken from the store by the police, could later be held as evidence of the weapon violation when the existence of the violation came to light.

Even if the court concludes that a search and seizure of the money took place about which Lynch has standing to complain, it was still a valid taking. A familiar exception to the warrant requirement is a search and seizure made incidental to an arrest. *Chimel* v. *California*, 395 U.S. 752, 89 S.Ct. 2034 (1969). In the present case, the weapon was properly seized and the defendant placed under arrest pursuant thereto. The seizure of the money was contemporaneous[3] with and incidental to the valid arrest and thus admissible. Such seizures in order to prevent the destruction of evidence have long been held proper. *Chimel*, supra 395 U.S. at 763.

It should be pointed out that the taking of the money amounts to normal and practical police procedure under the circumstances of this case. It would have been foolhardy for the

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[3] In order for the search to be incidental to an arrest it must be substantially contemporaneous therewith. *Shipley* v. *California*, 395 U.S. 818, 89 S.Ct. 2053 (1969); *Stoner* v. *California*, 376 U.S. 483, 84 S.Ct. 889 (1964). That the contemporaneous requisite does not require arrest prior to the search and seizure is inferred in *Stoner*, supra, and specifically sanctioned in *Cupp* v. *Murphy*, 412 U.S. 291, 93 S.Ct. 2000 (1973), where the search was valid although the defendant had not yet been arrested.

police to have left over $1,200.00 in cash in a vehicle in a public parking lot. A similar situation arose in *Fagundes* v. *United States*, 340 F.2d 673 (1st Cir. 1965). In that case, a car involved in an accident was disabled and its occupants, including the defendant, were arrested for being intoxicated. A police officer, while closing the windows to protect the car, saw bundles of money in an open bag in the back seat. The officer took custody of the money and turned it over to his acting chief. The acting chief notified the F.B.I. who checked the serial numbers of the money against a bait money list of a recently robbed bank. Some of the serial numbers were identical and the defendant was subsequently charged with the bank robbery. The court held that the procedure of the officers was "routine, proper and legal, wherefore what flowed from their action was not 'fruit' from a 'poisonous tree'." *Fagundes*, supra at 676.

The seizure of the money in the present case is equally valid even if the defendant was not under arrest. *Warden* v. *Hayden*, supra. A search and seizure incidental to an arrest is only one exception of the warrant requirement. The search and seizure here, if one is deemed to have taken place, could fall within other exceptions which would then render the defendant's arrest status meaningless.

First, if the taking of the money from the seat of Lynch's car is considered a search and seizure, it would still be justified since it constituted a proper vehicle search. *Carroll* v. *United States*, supra; *Chambers* v. *Maroney*, supra. Once the existence of probable cause became apparent in connection with the weapon charge, a search of the car for evidence was permissible.

Secondly, the defendant's consent to the search of his vehicle was not terminated. The taking of the money from the front seat may be deemed to have taken place pursuant to this consent.

Thirdly, it may be logically concluded that the evidence was seized as being in "plain view" rather than pursuant to a search. *Harris*, supra; *Coolidge*, supra; *Barone*, supra; *DiMarco* v. *Green*, 385 F.2d 556 (6th Cir. 1967). Under the "plain view"

doctrine there is no search. The evidence is simply seen and seized. In the present case the money was first seen by the officers in the store and thereafter remained constantly in their presence. The officers, literally or effectively, had a plain view of the money. Thus, once they had probable cause to arrest the defendant on the weapon charge the seizure of the money as evidence in plain view was proper.

POINT IV

THE MONEY WAS VALIDLY TAKEN INTO CUSTODY BY THE POLICE IN THE COURSE OF THEIR NORMAL POLICE DUTIES IRRESPECTIVE OF THE GUN VIOLATION.

On the night in question a large quantity of money was left in a shopping cart in a shaving kit with a box of bullets and a pair of sun glasses. Thereafter, the defendant claimed these items while being reluctant to identify himself to the store personnel or the police. The District Court in accepting the testimony of the store employees and the police officers, found that everyone concerned was being careful about the return of the money to Lynch, especially in view of his reluctance to identify himself. The Court further recognizes that the police, having been called by the store employees, had an obligation under New York Law to return the money to the rightful owner or to retain it until proper disposition could be made. (New York Personal Property Law, Section 252, 253, 254).[4] The statute provides that the lost

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[4] NY Pers. Prop. Law, Section 253 imposed additional duties on the police:

3. If the report of the person who deposited the property or instrument shows that the property or instrument was found in a place other than a public street or highway, the police with whom it is deposited shall give notice of the finding and deposit, including the location of the office to which the property or instrument is transmitted to the occupant of the premises where the property or instrument was found or to the person in charge of such premises. . .

4. If at any time the police have reason to believe that a person has an interest in found property or in a found instrument in their possession and reason to know his whereabouts, they shall give notice of the finding and deposit and the location of the office to which the property or instrument is transmitted to such person. . .

property must be disposed of by the police by delivering it to the owner upon his demand and upon payment of reasonable expenses, provided there has been no written notice of any other claim to the property. (New York Personal Property Law, Section 254, sub. 1). If this is not accomplished, the property is delivered to the finder or otherwise disposed of according to law. (New York Personal Property Law, Section 254, sub. 2, 3).

In the instant case, when the police arrived at the Price Chopper Market the money was in the custody of the "finder", i.e., the store. The police then took custody and continually retained possession of the money, either actually or constructively. They did so in order to fulfill an obligation to the rightful owner. That such conduct is reasonable is evidenced by the lost property statute itself.

It would have been reckless for the police to have summarily turned the money over to Lynch under the circumstances of this case. It was conceivable that Lynch may have simply heard of the finding of the property from some outside source and then sought an easy fortune. His reluctance to identify himself adds strength to this argument. A better course of action by the police was to retain the money pending a determination as to whether the claimant was the rightful owner.[5]

It logically follows that the duty of the police is not simply to return lost property to an "owner", but to a *rightful* owner, where possible. The police here were acting reasonably and prudently in keeping the money until a more detailed inquiry could be made during normal business hours as to the validity of the defendant's claim to such a large quantity of money and in ascertaining whether any other claims would be made.

Lynch argues that the original complaint, charging him with a felonious gun violation, by necessity had to charge him with the possession of bullets in order to succeed. (The complaint was

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[5] NY Pers. Prop. Law, Section 251 defines "owner" as any person entitled to possession of the lost property as against the finder and against any other person who has made a claim.

changed later that night so that it only entailed a misdemeanor, not involving bullets.) Therefore, he concludes that the police must have believed that the bullets, as well as the rest of the property in the shaving kit, properly belonged to Lynch. This argument fails to realize that Lynch could have validly been charged with the possession of this ammunition on the basis of probable cause whereas a greater degree of certainty would have been required in order to turn the shaving kit and its contents over to him as the rightful owner. The two possibilities were not mutually exclusive at the time.

Upon a finding that the money was taken by the police from the market the defendant then has no standang to contest the activities of the police. Under those circumstances there would be no search or seizure but rather an acquisition of lost property. The statute then imposes an obligation on the police to protect the interests of the rightful owner, whether or not such owner turns out to be the person objecting to the procedure and notwithstanding whether the police were fully aware that their obligations were statutory.[6]

If the holding of the money over the defendant's protest is considered a seizure, it would still be valid since the defendant's right of privacy would not violated. Only the true owner, whose identity has not yet been ascertained, is afforded such protection. The fact that Lynch might ultimately have been proven to have been the true owner is immaterial since the lost property statute, as well as reasonable police conduct, inherently deprives him of ownership rights until such ownership is determined with a reasonable degree of certainty. The Government recognizes that the subsequent discovery that some of the money was bait money and that the bank was the rightful owner does not justify an otherwise invalid seizure. The controlling factor, here, however, is that the right of privacy protected by the Fourth Amendment

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[6] The testimony of Officer Roland (T.M. 44) and Officer Leonard (T.M. 78) evidenced their belief that they were obligated to ascertain the rightful owner of the money and that they lacked the necessary degree of certainty to turn the money over to Lynch.

had already been forfeited, at least temporarily, by the loss of the property.

Finally, the Government contends that even if the statute is not controlling it is indicative of the reasonableness of the police officer's conduct. Even in the absence of the statute the conduct of the police was reasonable and therefore proper.

CONCLUSION

For the foregoing reasons, the Memorandum-Decision and Order of the District Court, relating to the appellant's motion for suppression, and the Judgment of Conviction appealed from should be affirmed.

Respectfully submitted,

JAMES M. SULLIVAN, JR.
United States Attorney

By

JAMES E. CULLUM
Assistant U.S. Attorney

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COUNTY OF ONONDAGA) ss.:
CITY OF SYRACUSE)

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